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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KYLE RAINEY,

Petitioner,

vs.

BEN VARNER *et al.*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Strickland v. Washington*, a *habeas* petitioner may establish "prejudice" if it is reasonably probable that, but for counsels' deficient performance, the outcome of the proceedings would have been different.

In this case, in which the petitioner claims ineffective assistance of counsel during the guilt phase of his trial and on appeal, the Third Circuit defined "prejudice" under *Strickland* as meaning that counsel's deficient performance must result in a longer or harsher sentence. In reaching that holding, the court of appeals followed one other circuit court's holding that prejudice means a different sentence. However, the Second, Sixth, Seventh and Ninth Circuits hold consistent with this Court's opinion in *Strickland* that, when counsel's deficient performance occurs during the guilt phase of trial, the question is whether counsel's deficient performance affected the verdict regardless of whether the ineffective assistance affected the length of the sentence.

The question in this case is as follows:

Whether a *habeas* petitioner alleging ineffective assistance of counsel in the guilt phase of his trial or on appeal can demonstrate the prejudice required by *Strickland* even if the length of his ultimate sentence would have been the same without the ineffective assistance of counsel.

LIST OF PARTIES

Petitioner, Kyle Rainey, is an inmate incarcerated in Pennsylvania pursuant to a life sentence of a Pennsylvania state court. Respondent is Ben Varner, warden of the facility in which Mr. Rainey is incarcerated.

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INTRODUCTION

Two federal judges have agreed with Petitioner Kyle Rainey that there was insufficient evidence that he had the shared intent to kill necessary to support his conviction for first-degree murder in the Pennsylvania state courts. But the district judge and then the Third Circuit decided that Mr. Rainey could not prove prejudice under the *Strickland* standard because he could have been properly convicted of second-degree murder and the sentence for that offense would have been the same as Mr. Rainey received for first-degree murder.

In *Strickland* and subsequent cases, this Court established a framework to evaluate claims of prejudice. As this Court has held, prejudice is assessed based on the point in the criminal proceedings at which counsel's deficient performance occurred. If counsel's deficient performance occurred during the guilt phase of trial (as here), the question is whether that deficient performance prejudiced the defendant with respect to the verdicts entered against him. If counsel's deficient performance occurred during the penalty phase of the trial, the question is whether that deficient performance prejudiced the defendant with respect to the sentence he received. If counsel's deficient performance occurred on direct appeal, the question is whether that deficient performance affected the outcome of the appeal.

If, as here, the deficiencies during the guilt phase of trial are such that the court's confidence in the verdict is undermined, the court should find prejudice and conclude its analysis. Under this Court's precedent, the court should not then investigate the record to see if the jury could have

convicted the defendant of some other crime for which he would (or could) have received the same sentence.

The Third Circuit's decision here collapsed those analyses in a way that is directly contrary to this Court's binding precedent and the approach taken in other courts of appeal. The Third Circuit declined to take up the case *en banc,* and so its precedential opinion is now in intolerable tension with this Court's precedent and that of other courts of appeal. This Court should accept review to assure uniformity in this important area of *habeas* law.

OPINIONS BELOW

The opinion of the court of appeals (Appendix "A") is reported at *Rainey v. Varner*, 603 F.3d 189 (3d Cir. 2010). The opinion of the district court (Appendix "B") is not reported but is available electronically at *Rainey v. Varner*, Docket No. 01-623, 2008 U.S. Dist. LEXIS 12836 (E.D. Pa., Feb. 21, 2008). The opinion of the magistrate judge is not reported but is reproduced at Appendix "C."

JURISDICTION

The court of appeals entered its judgment on April 24, 2010, and denied a timely petition for rehearing on May 27, 2010. This Court granted Mr. Rainey's application for an extension to file this petition on or before September 24, 2010. *See* Docket No. 10A146. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291 and the district court had jurisdiction under 28 U.S.C. §§ 1331 and 2254.

STATUTORY PROVISIONS INVOLVED

Section 2254 of the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, is excerpted in relevant part at Appendix "D."

STATEMENT OF THE CASE

Petitioner Kyle Rainey participated in a robbery during which a co-defendant shot and killed the storekeeper. Mr. Rainey was tried for and convicted of first-degree murder under an "accomplice-liability" theory under Pennsylvania law; that is, although Mr. Rainey did not pull the trigger, the jury found that he had the "shared intent" of his co-defendant to kill the storekeeper.

There is no evidence that Mr. Rainey intended that anyone kill the storekeeper or anyone else.

As a result of the first-degree-murder conviction, Mr. Rainey faced possible capital punishment. The jury deadlocked on whether to impose the death penalty and, as a matter of Pennsylvania law, Mr. Rainey received a life sentence for his first-degree-murder conviction.

Neither Mr. Rainey's counsel at trial nor his counsel on appeal ever challenged the sufficiency of the evidence against Mr. Rainey for first-degree murder. After exhausting his state-court remedies, Mr. Rainey filed in the federal district court a petition for a writ of *habeas corpus*, contending that both trial and appellate counsel were ineffective for failing to question the sufficiency of evidence to sustain a first-degree murder conviction under an accomplice-liability theory or otherwise. Specifically, Mr. Rainey challenged the sufficiency of the evidence that he ever harbored the intent to kill anyone during the robbery.

Both the magistrate judge and the district judge agreed that there was insufficient evidence

to sustain Mr. Rainey's first-degree-murder conviction. They both concluded there was no evidence that Mr. Rainey intended that the storekeeper be killed.

Although the magistrate judge recommended that the *habeas* writ be granted, the district judge disagreed and concluded that Mr. Rainey suffered no "prejudice" under *Strickland*. The district judge hypothesized that Mr. Rainey could have received a life sentence for second-degree ("felony" murder) in Pennsylvania, a conviction that would have carried with it a life sentence. Because the jury deadlocked on the death penalty and Mr. Rainey received a life sentence for his first-degree murder conviction, the district judge found no prejudice and denied the petition.

Mr. Rainey appealed. A panel of the Third Circuit Court of Appeals (Judges Fuentes and Fisher and Chief Judge Kane, sitting by designation from the United States District Court for the Middle District of Pennsylvania) agreed that Mr. Rainey did not suffer prejudice as a result of his counsels' deficiencies at trial or on direct appeal. Relying on a 26-year-old Fifth-Circuit opinion involving Louisiana law that did not involve an ineffective-assistance-of-counsel claim, the court of appeals reasoned that (1) Mr. Rainey happened to receive a life sentence for first-degree murder after the jury deadlocked on the death penalty; (2) there was evidence in the record that Mr. Rainey participated in a robbery during which someone died; and (3) Mr. Rainey would have received the life sentence he currently is serving *if* the jury convicted him of felony murder.

Accordingly, the court of appeals affirmed in a precedential decision. The appellate court denied a timely petition for rehearing.

REASONS FOR GRANTING THE WRIT

The Third Circuit's decision creates a conflict with *Strickland v. Washington* and related precedents. In addition, by adopting a previous holding of the Fifth Circuit that prejudice means "a different sentence" and rejecting the holdings of the Second, Sixth, Seventh and Ninth Circuits that hold otherwise, the Third Circuit expanded a conflict among the court of appeals. The Court should issue a writ to compel adherence to its precedential opinions, to resolve the circuit split on the issue presented and to ensure uniformity in this important area of *habeas* law.

I. THE THIRD CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THIS COURT'S HOLDING IN *STRICKLAND* AND RELATED PRECEDENTS.

In *Strickland*, the Court explained that the prejudice analysis hinges upon *when* in the criminal proceedings the alleged substandard performance takes place and the effect that performance has on the particular stage of the proceedings:

> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. *When a defendant challenges a conviction*, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt *respecting guilt*. When a defendant *challenges a death sentence* such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it

> independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances *did not warrant death*.

Strickland, 466 U.S. at 695 (emphasis added).

In subsequent cases, the Court has held that the required prejudice may occur in different ways at various stages of the criminal proceedings:

- ***Prejudice at the plea-bargain phase.*** A defendant may be prejudiced under *Strickland* during the plea phase of the proceedings if, but for counsel's deficient plea advice before trial, it is reasonably probable that the defendant would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 56 60 (1985).

- ***Prejudice at the guilt phase.*** A defendant may be prejudiced (as here) at the conclusion of the guilt phase of the proceedings if, but for counsel's deficient performance during trial, it is reasonably probable that the outcome of the trial would have been different. *Strickland*, 466 U.S. at 695 (differentiating between guilt-phase and sentencing-phase prejudice).

- ***Prejudice at the sentencing phase.*** A defendant may be prejudiced under *Strickland* at the sentencing phase if, but for counsel's failure to introduce mitigating evidence during the sentencing proceedings, it is reasonably probable that the defendant would have received a different sentence. *Glover v. United States*, 531 U.S. 198, 204 (2001).

- ***Prejudice at the appeal phase.*** A defendant may be prejudiced (as here) at the appeal phase if, but for counsel's deficient performance during the appeal, it is reasonably probable that the outcome of the appeal would have been different. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985).

In a footnote, the court of appeals in this case attempted to define prejudice under *Strickland* as meaning that counsel's deficient performance must lead to a different (or harsher) sentence. The court of appeals stated that "the Supreme Court has reemphasized in a number of cases that prejudice under *Strickland* requires a showing of a reasonable probability of a different result, *that is, a different sentence*." *Rainey*, 603 F.3d at 202 n.5 (emphasis added) (citing *Porter v. McCollum*, __ U.S. __, 130 S. Ct. 447, 453 (2009); *Wong v. Belmontes*, __ U.S. __, 130 S. Ct. 383, 386 (2009); *Wiggins v. Smith*, 539 U.S. 510, 536 (2003)). The problem with that reliance is that this is a guilt-phase case, and each of the cases cited by the court of appeals was a *penalty*-phase case.

In its opinion in this case, the Third Circuit ignored the distinction required by this Court's jurisprudence and collapsed the analysis in a way at odds with this Court's precedents. Contrary to the Third Circuit's holding, it is not correct that a harsher sentence is the *sine qua non* of prejudice under *Strickland* regardless of the circumstances and the phase of the criminal proceeding at issue. If it were, the decisions noted in the bullet-pointed list above would have engaged in a "different-sentence" analysis regardless of the point at which the ineffective assistance of counsel occurred. They did not.

Moreover, the Third Circuit's holding in this case ignores any ancillary prejudicial effects that a

wrongful judgment of conviction might have on a defendant wholly apart from the length of his sentence. Assume for the moment that a defendant is tried for sexual exploitation of a child and child abuse, both of which carry the same sentence. If the defendant is convicted of sexual exploitation, he must be placed on a sex-offender list as a matter of law (rather than as part of his sentence). Under the Third Circuit's interpretation of prejudice, even if the defendant were wrongly convicted of sexual exploitation as a result of his counsel's failures at trial, the defendant would not be entitled to relief because the length of his sentence for a different conviction (child abuse) would have been the same. However, while the sentences might be the same, the ancillary effects of the sexual-exploitation conviction would unquestionably be more deleterious to the defendant.

Accordingly, the Court should issue a writ to resolve the direct conflict with *Strickland* that the court of appeals created when it created a *per se* rule that prejudice under *Strickland* means "a different sentence."

II. THE THIRD CIRCUIT'S DECISION EXPANDS A SPLIT AMONG THE CIRCUITS.

The court of appeals' conflation of sentencing-phase deficiencies with guilt-phase deficiencies essentially adds a requirement nowhere to be found in *Strickland:* that no matter when counsel's assistance is deficient or what other prejudice it might cause, the petitioner must also demonstrate that it caused him to receive a more onerous sentence. Neither *Strickland* nor its progeny impose such a requirement, but the Third Circuit's decision in this case has now done so for petitions

arising in Pennsylvania, New Jersey, Delaware and the United States Virgin Islands.

Petitioners in the Second, Sixth, Seventh and Ninth Circuits are not required to demonstrate that their counsel's guilt-phase deficiencies led to a longer sentence. In those circuits, the courts apply *Strickland* in a way that permits a defendant to demonstrate prejudice from guilt-phase ineffective assistance of counsel if it is reasonably probable that the deficiency undermines the court's confidence in the jury's verdict, without considering the length of the defendant's sentence:

- *Wilson v. Mazzuca*, 570 F.3d 490, 507 (2d Cir. 2009) (even though defendant already served his sentence, court granted *habeas* relief for improper conviction because errors during the guilt phase prejudiced defendant, stating that "[o]ur confidence in the jury's *verdict* is critically undermined") (emphasis added).

- *Brown v. Smith*, 551 F.3d 424, 435 (6th Cir. 2008) ("Given the nature of this missing evidence, its absence was an error sufficient – where there was no other evidence of Brown's *guilt* – to undermine our confidence in the *outcome of his trial*"; no comparison of sentence for other potential conviction) (emphasis added).

- *Montgomery v. Petersen*, 846 F.2d 407, 414 (7th Cir. 1988) ("In order to demonstrate prejudice, the petitioner need only establish a reasonable probability that the Sears witness' testimony *would have changed the jury's verdict*"; no discussion of sentence) (emphasis added).

- *Luna v. Cambra*, 306 F.3d 954, 966 (9th Cir. 2002) ("Had the jury heard Jennie and Gloria Luna's corroborating testimony and evidence of Lopez' inculpatory statements, there is a reasonable probability that *the jury would have returned a different verdict.* For these reasons, *our confidence in its guilty verdict* has been undermined"; no discussion of sentence) (emphasis added).

In these decisions, the courts held that the defendant suffered prejudice and was entitled to *habeas* relief because guilt-phase deficiencies undermined the court's confidence in the verdict. The analysis ended there. None of the courts evaluated whether the defendant could have been convicted of some other crime with the same sentence or whether the defendant received a longer sentence as a result of the deficient performance during the guilt phase of trial.

By contrast, precedent from the Fifth Circuit agrees with the Third Circuit's holding that a prejudice analysis focuses on the length of the sentence even assuming an improper conviction. In *Clark v. Maggio*, 737 F.2d 471 (5th Cir. 1984), the defendant, who participated in a felony during which someone died, challenged his conviction for first-degree murder under Louisiana law, arguing that the government failed to prove each element of that offense beyond a reasonable doubt as required by *Jackson v. Virginia*, 443 U.S. 307 (1979).

Under Louisiana law at the time, first-degree murder was, essentially, second-degree (felony) murder plus an intent to kill, and the state had to prove intent in order to support a first-degree-murder conviction and to impose the death penalty. In other words, the jury must have found the defendant guilty of at least second-degree

murder before it could have found the defendant guilty of first-degree murder. Upon conviction, the defendant was sentenced to death, which was later vacated because Louisiana's mandatory death sentence was declared unconstitutional. As a result, the defendant received 25 years to life in prison, the same sentence he could have received for felony murder.

The Fifth Circuit concluded that, although there was insufficient evidence of intent to kill, the jury, as a function of Louisiana law, necessarily found the defendant guilty of second-degree murder. Because the defendant would have received a 25-to-life sentence for that offense (the one he was serving for first-degree murder), the constitutional error was not prejudicial. Thus, *Maggio* is at odds with the authority of the other circuits cited above, and the Third Circuit's decision in this case widens the division.

Because the Third Circuit has expanded a split among the circuits on the question of prejudice under *Strickland*, the Court should issue the writ to resolve the uncertainty highlighted by the Third Circuit's decision in this case.

III. THE COURT OF APPEALS ERRED WHEN IT CONCLUDED THAT MR. RAINEY IS NOT ENTITLED TO RELIEF.

Had the circuit court applied the correct standard, Mr. Rainey likely would have received *habeas* relief because he did not receive the benefit of effective assistance of counsel as required by the Sixth Amendment and has served over 16 years of a life sentence for a conviction that is not supported by the evidence in violation of *Jackson v. Virginia*, 443 U.S. 307 (1979). In addition,

double-jeopardy principles would preclude retrials for murder such that Mr. Rainey should have been released from custody unconditionally, yet he remains imprisoned for life.

First, two federal judges agree there is insufficient evidence of "shared intent" to support Mr. Rainey's conviction for first-degree murder under an accomplice-liability theory. As a result of his counsel's failure at trial to move for acquittal, Mr. Rainey suffered an unconstitutional conviction. The Third Circuit ignored that altogether.

Second, the Third Circuit essentially held that Mr. Rainey could not establish prejudice unless the jury decided to put him to death. That cannot be so. But for trial counsel's deficient performance, it is reasonably probable that Mr. Rainey would not have faced the death penalty for a crime the Commonwealth failed to prove beyond a reasonable doubt. Because "death is different," the prospect of facing a death sentence is itself prejudicial, especially when a simple motion by trial counsel could have avoided that prospect altogether.

Third, the court of appeals did not consider appeal-phase prejudice at all. Counsel should have urged insufficient evidence on appeal so the Pennsylvania Superior Court could vacate the sentence and enter a judgment of acquittal of first-degree murder. Mr. Rainey suffered appeal-phase prejudice because the result in his direct appeal would have been different than it was had counsel performed at the constitutionally required level.

Fourth, the court of appeals could only reach its conclusion in this case if it hypothesized that the jury rendered a guilty verdict for felony murder. That violates the jury-trial guarantee. *See*

Sullivan v. Louisiana, 508 U.S. 275, 277-79 (1993) ("That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee."); *Bollenbach v. United States*, 326 U.S. 607, 614 (1946). ("The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.").

Finally, the court of appeals improperly overlooked the double-jeopardy issues in this case. If there is insufficient evidence to sustain Mr. Rainey's conviction for first-degree murder, he should have been acquitted of that charge such that double jeopardy would preclude a retrial. *Burks v. United States*, 437 U.S. 1, 5-18 (1978). Mr. Rainey's convictions and sentences for lesser-included offenses (for which he has served the maximum) prevent retrials for second and third-degree murder as well. *Brown v. Ohio*, 432 U.S. 161 (1977); *Greene v. United States*, 355 U.S. 184 (1957).

In the end, Mr. Rainey remains incarcerated for a crime that the Commonwealth failed to prove beyond a reasonable doubt when his record should show an acquittal for that charge, and he has served more time in prison than his remaining convictions require. He should have received *habeas* relief, yet he remains incarcerated for life. That untenable result flows directly from counsels' substandard performance and violates the Sixth Amendment.

In holding otherwise, the Third Circuit departed sharply from this Court's precedent and the application of that authority by a number of other courts of appeals The Third Circuit's opinion

perpetuates a lack of uniformity in application of federal law in an area of critical importance. District courts within the Third Circuit are confronted every day with *habeas* applications claiming ineffective assistance of counsel, and they have now been instructed to evaluate the "prejudice" prong of *Strickland* in a manner at odds with the application of that test by this Court and by other courts of appeals. That is an intolerable conflict.

The Court should grant this petition, issue the writ of *certiorari* and reverse the decision of the Third Circuit.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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